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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

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7 RAYMOND JAMES DUENSING,

8 Plaintiff,

9 vs.

10 DAVID MICHAEL GILBERT, *et al.*,

11 Defendants.
12

2:11-cv-01747-GMN-VCF

REPORT AND RECOMMENDATION

13 Before the Court is *Raymond James Duensing v. David Michael Gilbert, et al.*, case no. 2:11-cv-
14 01747-GMN-VCF.

15 **Background**

16 Plaintiff filed his Complaint against defendants David Michael Gilbert, individually and in his
17 official capacity as a police officer employed by the Las Vegas Metropolitan Police Department,
18 TASER, Las Vegas Metropolitan Police Department (LVMPD), DOES 1-100, and ROES 101-200 on
19 October 28, 2011. (#1).

20 On July 18, 2013, Defendants filed a Motion for Involuntary Dismissal (#56). Defendants assert
21 that Plaintiff has failed to respond to written discovery and has not done anything to prosecute this
22 action since the opposition to the Motion to Compel filed on May 9, 2013 (#38). *Id.* Plaintiff has failed
23 to appear for his scheduled deposition and failed to comply with the order to prepare a joint interim
24 status report. *Id.* Plaintiff failed to pay \$1,007.00 in attorney's fees by July 8, 2013. *Id.*
25

1 On August 5, 2013, Plaintiff filed an Opposition to Defendants' Motion for Involuntary
2 Dismissal. (#59). He states responses to written discovery were provided to Defendants but the
3 attorney's fees and costs were not paid. *Id.*

4 Defendants represent to the court in their reply that they have not received responses for any of
5 the written discovery. (#61).

6 On September 18, 2013, the Order Scheduling a Settlement Conference was entered and the
7 settlement conference was scheduled for December 17, 2013. (#67). The parties were ordered to deliver
8 settlement conference statements to chambers on December 10, 2013. Plaintiff failed to deliver his
9 settlement conference statement on December 10, 2013. Chambers called Plaintiff twice regarding the
10 settlement conference statement. On December 12, 2013, Plaintiff was ordered to submit to chambers
11 his confidential settlement statement by 4:00 p.m., Friday, December 13, 2013. (#71). Plaintiff failed to
12 submit the settlement conference statement. On December 17, 2013, the settlement conference was held
13 and Plaintiff failed to appear for the settlement conference. (#73).

14 **Relevant Law**

15 Plaintiff Duensing, appearing *pro se* in this action, was ordered to follow the rules and orders of
16 the Court and familiarize himself with the Federal Rules of Civil Procedure as well as the Local Rules of
17 this court. (#25). See *Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986)(holding that *pro se*
18 parties are not excused from following the rules and orders of the court).

19 Plaintiff has repeatedly failed to follow the rules of this Court. He has not complied with Fed. R.
20 Civ. P. 26. He has repeatedly failed to respond to Defendants' written discovery despite two orders
21 compelling responses and imposing monetary sanctions. (#'s 51 & 60). Plaintiff states in his
22 Opposition to Defendants' Motion for an Involuntary Dismissal that he refuses to pay Defendants their
23 attorney's fees and costs as ordered in docket #51. (#59).

24 Under Fed. R. Civ. P. 37(b), if a party fails to obey an order to provide or permit discovery,
25 including an order under Rule 26(f) then the court where the action is pending may issue further just

1 orders and may dismiss the action or proceeding in whole or in part. Plaintiff has failed to comply with
2 Court Orders (#'s 51 & 60) concerning discovery.

3 Pursuant to Fed. R. Civ. P. 41(b), [i]f the plaintiff fails to prosecute or to comply with [the] rules
4 or a court order, a defendant may move to dismiss the action or any claim against it.

5 The Court has clear authority to dismiss the case for failure to cooperate in the progress of the
6 litigation. "This power is necessary to prevent undue delays in the disposition of pending cases, docket
7 congestion, and the possibility of harassment of the Defendant." *Mederios v. United States*, 621 F.2d
8 468, 470 (1st Cir. 1980). To be sure, "[all litigants, including *pro ses*, have an obligation to comply with
9 court orders." *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990)(per curiam). Thus, when they flout
10 the obligation to comply with court orders they, like all litigants, must suffer the consequences of their
11 non-compliance. See *McDonald v. Miegel*, 850 F.2d 121, 124 (2d Cir. 1988). Further, the Court need
12 not always exhaust every sanction short of dismissal before final action. *Edelson v. Commissioner*, 829
13 F.2d 828, 831 (9th Cir. 1987). Such a decision lies within the discretion of this Court. See *National*
14 *Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Link v. Wabash R. Co.*,
15 370 U.S. 628 (1962) (affirming district court's dismissal under Rule 41(b) after plaintiff's attorney failed
16 to appear at a pretrial conference).

17 Plaintiff failed to comply with the Order Scheduling Settlement Conference (#67). A Settlement
18 Conference was scheduled for December 17, 2013 and the parties were ordered to deliver settlement
19 conference statements to chambers on December 10, 2013. On December 10, 2013, Plaintiff failed to
20 deliver settlement statements to chambers. On December 12, 2013, the Court ordered Plaintiff to submit
21 to his settlement statement to chambers on December 13, 2013 and a copy of the Order (#71) was
22 mailed and emailed to Plaintiff. Chambers staff also left two voice mail messages for Plaintiff regarding
23 his confidential statement.

24 On December 17, 2013, Plaintiff failed to appear at the scheduled settlement conference. (#73).
25 Plaintiff has continuously failed to comply with this Court's Orders. (#'s 23, 25, 51, 60, 67 & 71).

RECOMMENDATION

Based on the foregoing, it is the recommendation of the undersigned United States Magistrate Judge that Defendants' Motion for Involuntary Dismissal (#56) be GRANTED and the case be dismissed under Fed. R. Civ. P. 37(b) and 41(b).

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 17th day of January, 2014.



CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE